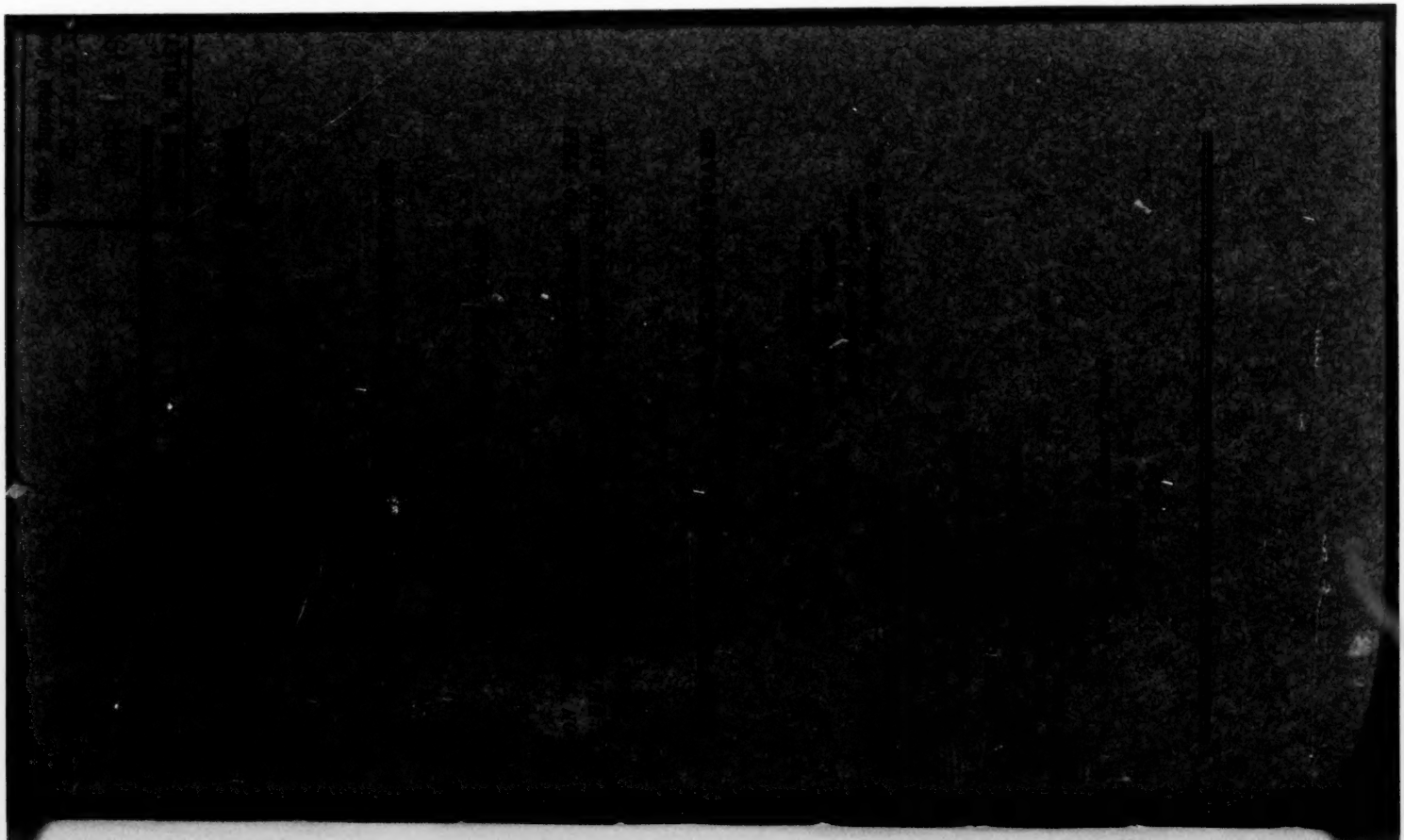

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 661

UNION MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 23-38) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (Pet. App. 3-22) are reported at 107 NLRB No. 61, 102 NLRB 1626, and 101 NLRB 1028.

JURISDICTION

The judgment of the court below (Pet. App. 46) was entered on January 14, 1955. The petition for

a writ of certiorari was filed on March 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether under Section 9(c)(3) of the Act strikers who have not been discharged, replaced, or refused reinstatement by their employer are eligible to vote in a Board-conducted election even though they have engaged one and three months prior to the election in strike misconduct for which the employer could lawfully have discharged them.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 38-41.

STATEMENT

The facts were stipulated by the parties in the court below (R. 4-12) and may be summarized briefly as follows:

A. The proceedings before the Board

On March 12, 1952, about eight days after a strike began at petitioner's plant, petitioner refused the request of the Union (American Federation of Hosiery Workers, AFL) for recognition. The Union filed a petition for certification on June 4, and on June 25, while the strike was still in progress at the plant, the Board conducted an election among petitioner's employees.

Of the 157 votes cast in the election, 1 favored the Union, 26 opposed the Union, and 110 were challenged, the challenges being made, in all but one instance, by the Board Agent. Most of the challenged ballots were cast by employees who were engaged in the strike and whose names were not included in the eligibility list furnished by the Company for use in the election.

The challenged ballots being sufficient to affect the result of the election, the Regional Director, on September 12, after conducting an investigation, issued a Report on Challenges. In pertinent part the Report disclosed that 82 of the challenged ballots were cast by voters who the Company alleged had engaged in picket line misconduct on occasions approximately 3 months and 1 month before the election was held, of which 23 were further disqualified by reason of their allegedly having obtained permanent employment elsewhere prior to the election. [1]

In reviewing the Regional Director's report, the Board in a Decision and Order issued on December 12, 1952, sustained the Union's contention that the voters of the contested ballots would be eligible to vote in the election regardless of whether they had engaged in the misconduct alleged by petitioner if none of them had been discharged, permanently replaced, or denied reinstatement. In so holding, the Board rejected petitioner's contention that by engaging in strike misconduct an economic striker

[1] The grounds for challenge and final disposition of ballots challenged on grounds other than picket line misconduct (R. 5-6) have no relevance to the issue here.

automatically renders himself "not entitled to reinstatement" within the meaning of Section 9(c)(3) of the Act (Pet. App. 40) and hence ineligible to vote in a Board election. The Board concluded, in the light of the Act's legislative history and settled construction, that Section 9(c)(3) was intended to preclude from voting only those economic strikers who would definitely not be included in the future bargaining unit, *i.e.*, strikers who had been lawfully discharged, replaced, or denied reinstatement by their employer, and that the provision had no application to strikers who, although susceptible by reason of misconduct to a lawful termination of their employment, had not in fact been discharged, permanently replaced, or denied reinstatement at the time of the election.[2] The Board, therefore, deferred hearing with respect to the challenged ballots and remanded the proceeding to the Regional Director for a determination whether any of the 82 voters whose ballots were contested on grounds of misconduct had been discharged or denied reinstatement prior to the date of the election.

The Regional Director reported that none of the 82 strikers whose ballots were contested on grounds

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[2] Other affirmative acts, noted by the Board, entailing loss by a striker of employee status and voting eligibility were (1) the employee's securing permanent employment elsewhere or (2) the operation of Section 8(d) of the Act (29 U.S.C. 158 (d)), which provides for the immediate loss of employee status for engaging in a strike under circumstances not here relevant (Pet. App. 5).

of misconduct had been permanently replaced, discharged, or denied reinstatement prior to the election on June 25, 1952, and that the Company had stated as late as December 23, 1952, that it had "taken no affirmative action with reference to discharges or reinstatements" of these employees. The Board accordingly directed that ballots challenged on this ground alone, together with ballots challenged on this ground and other grounds held not sustained, be opened and counted. The revised tally of ballots disclosed that ballots held valid had resulted in a conclusive election in favor of the Union. On March 17, 1953, the Board certified the Union as the exclusive representative of the employees in the appropriate unit.

Notwithstanding the certification, petitioner on April 13, 1953, refused the Union's request for collective bargaining on the ground that a hearing should have been held to determine whether the challenged voters had engaged in strike misconduct. The Board rejected this contention in its Decision and Order, issued on November 25, 1953, as "without merit inasmuch as the [Company] had not, in fact, discharged, permanently replaced, or refused to reinstate any of the challenged voters prior to the date of the election." The Board, accordingly, found that petitioner violated Section 8(a)(1) and (5) of the Act (Pet. App. 39) by refusing to bargain with the Union as the exclusive representative of the employees within the appropriate unit. It ordered the Company to cease

and desist from the unfair labor practice found; upon request, to bargain with the Union; and to post appropriate notices.

B. The decision of the court below

Observing that the sole question presented was one of statutory construction, the court below held that Section 9(c)(3) "upon its face is ambiguous," and that its terms afford reasonable support both to petitioner's reading and to the Board's view that by engaging in misconduct a striking employee does not automatically forfeit his right to vote in a Board election but instead remains eligible to vote until his employer takes affirmative action to discharge, permanently replace, or refuse to reinstate him because of his misconduct (Pet. App. 24-26). The court further held, as had the Board, that in these circumstances the intent of Section 9(c)(3) must be ascertained from its legislative history, which makes it "clear that its purpose was to make ineligible strikers whose reinstatement rights had already been destroyed by the employer's action and who were for that compelling reason ineligible for reinstatement at the time of the election" (Pet. App. 29).

One judge dissented on the ground that a contrary interpretation of Section 9(c)(3) was required to promote the Act's policy of preserving industrial peace. In rejecting this suggestion the majority in its decision noted that an "employer has a right to discharge employees who misconduct themselves" and that "a mere denial of a vote in

a bargaining agent election would add little, if anything, to the deterring effects of the employer's right to discharge" (Pet. App. 29).

ARGUMENT

1. The decision of the Board, affirmed by the court below, that unreplaced economic strikers are eligible to vote in a Board election notwithstanding misconduct prior to the election, presents no conflict of decisions and is correct. The decision is simply an application of the settled rule that strike misconduct, although grounds for discharge or refusal of reinstatement, does not automatically work a forfeiture of employee status.

It has long been settled that strikers who engage in misconduct remain employees unless and until their employer "affirmatively exercise[s] his option to terminate the relationship, either by discharging the strikers or refusing reinstatement." [3]

[3] *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 483-484 (C.A. 3). Accord: *National Labor Relations Board* v. *Fansteel Met. Corp.*, 306 U.S. 240, 255-256; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344; *National Labor Relations Board* v. *Aladdin Industries*, 125 F. 2d 377, 382 (C.A. 7), certiorari denied, 316 U.S. 706; *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 183 (C.A. 6); *El Paso Elec. Co.* v. *National Labor Relations Board*, 119 F. 2d 581, 582 (C.A. 5), enforcing, 13 NLRB 213, 235-238, 240; *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. 2d 903, 915 (C.A. 8); *National Labor Relations Board* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 886 (C.A. 2), certiorari denied, 342 U.S. 871; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885-886 (C.A. 1), certiorari denied, 313 U.S. 595; *National Labor Relations Board* v. *Stilley Plywood Co., Inc.*, 199 F. 2d 319, 320-321 (C.A. 4), enforcing, 94 NLRB 932, 934, 938-939, certiorari denied, 344 U.S. 933.

Applying this rule, the Board held in the only two cases to raise the issue under the Wagner Act that strike misconduct did not deprive a striker who had not been discharged of his right to vote in a Board election. *Precision Castings Co.*, 26 NLRB 528, 535-536; *Worcester Woolen Mills Corp.*, 69 NLRB 425, 429-430, enforced, 170 F. 2d 13 (C.A. 1). The present case is the sole instance in which the same issue has been raised under the amended Act.

Because the purpose of a Board election is to determine whether the employees in a particular unit are to have a collective bargaining representative, the fundamental test for voting eligibility is whether it appears likely that the voter in question will be affected by the election—that is, whether he will be among the employees whom the bargaining agent will represent. Under the Wagner Act, however, the Board departed from this general principle in one respect; it held that where economic strikers had been replaced, *both* the replacements *and the strikers* were eligible to vote. *Rudolph Wurlitzer Co.*, 32 NLRB 163, 166-167.[4] The legislative history of the 1947 amendments shows that Congress' sole purpose for providing in Section 9(c)(3) that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote" was to reverse the *Wurlitzer* doctrine, and to bar from voting *replaced* economic strikers wh-,

[4] The *Wurlitzer* case, decided in 1941, was thereafter consistently followed by the Board until the 1947 amendments. See, *e.g.*, N.L.R.B., *Eleventh Annual Report* (G.P.O. 1947), p. 21, n. 64.

because they had been replaced, would not be employed in the unit and would not be affected by the election.

As stated by Senator Ball, one of the managers of the bill in the Senate and a member of the conference committee which formulated Section 9(c)(3) (93 Cong. Rec. 4195-4196; 2 Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948) (hereafter cited as Leg. Hist.), p. 1102:

> *The only change made in existing law* by the amendment . . . is to limit the provision to employees who are on strike, who have been replaced, not by strikebreakers but by employees who have accepted permanent employment. The Supreme Court has held that the employees on strike who have been replaced have no right to reinstatement. [Italics supplied.] [5]

Senator Ball also stated that the provision was aimed at making "strikers who have been replaced" ineligible to vote and was intended to obviate the "ridiculous situation of a thousand persons voting for a bargaining agent for only 500 jobs" (93 Cong. Rec. 4196, A2252-2253; 2 Leg. Hist. 1102, 1525). Senator Taft similarly explained that the provision applied where strikers "have been replaced" and that "the bill provides in that case that the former employee cannot vote in the

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[5] The dissenting opinion in the court below, in suggesting that Congress may have had additional objectives in mind (Pet. App. 35-36), overlooks the force of Senator Ball's reference to "the only change made in existing law."

election," 93 Cong. Rec. 3838-3839, 2 Leg. Hist. 1014.[6] See also Senator Taft's statement to the Eighty-First Congress that repeal of this provision would only mean that the Board would "probably go back * * * to the rule established * * * before the Taft-Hartley law, namely, that both the strikers and the permanent employees may vote." 95 Cong. Rec. 8587.[7]

2. Petitioner contends (Pet. 9-16) that, notwithstanding the legislative history, a literal reading of the provision requires that the franchise be withheld from strikers guilty of misconduct because they are not "entitled to reinstatement." But this contention proves too much, for in a literal sense *no* striker is "entitled to reinstatement"; as petitioner concedes (Pet. 10), he is "entitled" only to non-discriminatory treatment for having gone on strike. Thus, reinstatement may be lawfully denied not only to strikers guilty of misconduct, but also to strikers whose jobs have been abolished, or who are physically incapacitated, or who have become *persona non grata* to the employer for reasons unconnected with the strike.[8] In short, petitioner's

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[6] Other legislative history is summarized in the opinion of the court below, Pet. App. 26-29.

[7] For other post-legislative history reflecting the limited purpose of Section 9(c)(3) see the *Report of the Joint Committee on Labor-Management Relations*, S. Rept. No. 986, Part 3, 80th Cong., 2d Sess., p. 75; S. Rept. No. 99, Part 2, 81st Cong., 1st Sess., p. 5; S. Rept. No. 1211, 83d Cong., 2d Sess., pp. 12, 52.

[8] A striker, like any other employee, may be discharged for "a good reason, a bad reason, or no reason at all," save only that he may not be discriminated against for activity protected

literal reading of Section 9(c)(3) leads to the conclusion that no striker can vote, a result envisioned in the Senate Minority Report from which it quotes (Pet. 17).[9] But this reading was explicity rejected by the sponsors of the legislation, who indicated, as we have noted (p. 9), that the only change made in existing law was to make strikers who had been replaced by employees who had accepted permanent employment ineligible to vote.

The determination of eligibility must, as petitioner recognizes (Pet. 22), be made at the time of the election. As of this date, no economic strikers are "entitled to reinstatement" in any absolute sense, for, as we have shown, any of them *may* on the happening of various contingencies lawfully be denied reinstatement. On the other hand, the right to reinstatement of strikers who have been lawfully discharged or permanently replaced has already been defeated. This latter group was the one which

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by the Act. *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C.A. 3); Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46.

[9] The sentence preceding the excerpt quoted by petitioner (Pet. 17) reveals the understanding of the minority. The Report states (S. Min. Rept. No. 105, Part 2, 80th Cong., 1st Sess., p. 10; 1 Leg. Hist. 472): "As we understand this provision it would prevent employees who go out on strike because of a dispute over such matters as wages, hours, or working conditions from voting in a Board election held during the strike. This restriction is not conditioned upon replacement or an offer of reinstatement by the employer. It is automatic." But, as this Court has pointed out, "it is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395.

Congress intended should be excluded from the election inasmuch as these discharged or replaced strikers are the only ones who it is known at the time will not be affected by the choice of a bargaining representative.

The judicial precedents relied on by petitioner (Pet. 9-14) are not in conflict with the decision below. Without exception these cases involve situations in which the employer had as of the date of the election discharged the employees or refused them reinstatement because of their misconduct; none of them hold that misconduct of itself works a forfeiture of employee status. See cases cited at page 7, note 3, *supra*.

3. Underlying petitioner's contentions, and articulated by the dissent in the court below (Pet. App. 30-38), is the idea that strike misconduct should be punished by loss of voting rights. This theory, however, has been consistently rejected by Congress, which has repeatedly refused to impose an automatic loss of status on persons who engage in strike misconduct. In debates on the Case Bill, the 79th Congress rejected a provision that would have penalized strike misconduct with loss of the franchise in Board elections.[10] Amendments to the Case Bill, offered by Senators Taft, Ball, and Smith (all later members of the Committee which formulated Section 9(c)(3) of the Act), provided that employees who struck in breach of contract

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[10] See H.R. 5262, 79th Cong., 2d Sess., Sec. 11(a), discussed at 92 Cong. Rec. 687, 786, 1070-1071, 5926, 5929.

or in advance of a "cooling-off" date would forfeit their status as employees, including voting rights, but employees who were guilty only of strike misconduct would forfeit only rights under Section 10 of the National Labor Relations Act (29 U.S.C. (1946 ed.) 160). S. Rept. 1177, Part 2, 79th Cong., 2nd Sess., pp. 4, 7, 10-11, 19-21. Finally, where Congress in the amended Act chose to work a forfeiture of voting rights (*i.e.*, rights under Section 9 (29 U.S.C. 159)), it did so expressly and applied that penalty only to employees who strike during the waiting period prescribed by Section 8(d) (29 U.S.C. 158(d)).[11] There is thus no warrant for the inference, urged by petitioner, that it was the purpose of Congress in amending Section 9 (c)(3), to impose an automatic forfeiture of voting rights on strikers who engage in strike misconduct.

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[11] The closing sentence of Section 8(d) provides:

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

CONCLUSION

The judgment of the court of appeals is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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